IN THE COURT OF APPEALS OF IOWA

No. 7-439 / 06-1974
Filed July 25, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDALL ROSS MOSHER,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Robert J. Dull, Judge.

Defendant appeals from his conviction of possession of marijuana. **REVERSED AND REMANDED.**

Dewey P. Sloan, Jr., LeMars, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Darin J. Raymond, County Attorney, and Amy Oetken, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Defendant-appellant, Randall Mosher, appeals from his conviction of possession of marijuana, contending there was not sufficient evidence to support the conviction beyond a reasonable doubt. Because we conclude the State failed to prove constructive possession, we reverse and remand for dismissal.

I. Background.

Police searched the house leased by defendant and found several bags of marijuana. One bag was on a shelf of the coffee table in the living room on the main floor. The rest of the bags were found upstairs in a bedroom used by Mark Vaughn, who stated he purchased all the marijuana and it belonged to him. Vaughn also claimed the pipe for smoking marijuana that was found on the shelf of the coffee table was his. Defendant denied the marijuana in the house was his, but admitted to smoking marijuana with Vaughn in the past.

Following a bench trial, the court found defendant guilty of possession of marijuana. The court concluded:

> The only issue before the Court is whether the Defendant was in "possession" of the marijuana. The Court initially concludes that the Defendant knew the marijuana was there. He admitted so, and whether or not it was put there that night, the evidence supports the conclusion that he knew it was there, whether because he had used it previously or observed Mr. Vaughn put it there that night. The marijuana was left in a common area and separate from the balance of the marijuana, which Mr. Vaughn took to his bedroom.
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> The only reason for the marijuana to be left on the coffee table shelf in proximity to a pipe used to smoke it was that it was anticipated it would be smoked. Both Mr. Vaughn and the Defendant admitted they smoked marijuana together in the house, and Mr. Vaughn testified the Defendant could not use his stuff when he was not at the residence. Mr. Vaughn was present and, in fact, left the baggy where the Defendant was. It is logical to assume he did so for the Defendant to have access to it. Such, in

> this Court's opinion, constitutes constructive possession of the marijuana by the Defendant.

Defendant filed a motion in arrest of judgment, contending (1) the judgment was facially defective in that it did not conclude beyond a reasonable doubt that he had constructive possession, and (2) the evidence was insufficient to convict beyond a reasonable doubt. The court denied the motion.

II. Scope and Standards of Review.

We review sufficiency-of-the-evidence claims for errors at law. Iowa R. App. P. 6.4. We review the trial court's findings in a jury-waived case as we would a jury verdict: We uphold a verdict if substantial evidence supports it. *State v. Weaver*, 608 N.W.2d 797, 803 (Iowa 2000). "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002). We consider all record evidence, not just the evidence supporting guilt, when making sufficiency-of-the-evidence determinations. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(*p*). We view the evidence in the light most favorable to the State, "including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence." *Biddle*, 652 N.W.2d at 197. "The State must prove every fact necessary to constitute the crime with which the defendant is charged." *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002). "The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *Id.*

III. Merits.

Defendant contends there was not sufficient evidence to conclude he had constructive possession of the marijuana. "The existence of constructive possession turns on the peculiar facts of each case." *State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002). Constructive possession occurs "'when the defendant has knowledge of the presence of the controlled substance and has the authority or right to maintain control of it.'" *State v. Henderson*, 696 N.W.2d 5, 9 (Iowa 2005) (quoting *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003)).

It is clear that defendant had knowledge of the presence of the bag of marijuana on the shelf of the coffee table. Because the marijuana was not in an area under defendant's exclusive control, the fighting issue is whether he had "the authority or right to maintain control" of the marijuana. *Henderson*, 696 N.W.2d at 9.

> A number of factors may support a finding that a defendant had knowledge of the presence of drugs and the right to exercise control over them as well as access and control of the place and premises where the drugs are found. Such factors include incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of drugs among or near the defendant's personal belongings, the defendant's fingerprints on the packages containing the drugs, and any other circumstances linking the defendant to the drugs.

Webb, 648 N.W.2d at 79. (Citation omitted.)

Defendant denied the marijuana was his or that he could use it. Vaughn claimed the marijuana was his and that he had brought it to the house just a few minutes earlier. One officer testified defendant told him he had smoked marijuana from that bag. The investigatory report he wrote at the time, however, merely notes the defendant said he had smoked marijuana with Vaughn five

days earlier. It does not make reference to this particular bag of marijuana. Vaughn testified defendant "didn't bother my stuff" when Vaughn was not there. His testimony continued:

> Q. Okay. Nonetheless, if he asked, you let him smoke the marijuana, right? A. Yes, ma'am.
> Q. And would that include the marijuana that was found in the living room? A. No. I just got that.
> Q. Oh, excuse me. If he asked you to smoke that you wouldn't have let him? A. Oh, well, maybe, but he didn't.

The district court concluded "[i]t is logical to assume" Vaughn left the marijuana in the common area so defendant would have access to it. Both defendant and Vaughn denied defendant could use the marijuana without permission. "The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *Webb*, 648 N.W.2d at 76. We conclude the evidence does not "allow a reasonable inference that the defendant . . . had control and dominion over the contraband." *State v. Cashen*, 666 N.W.2d 566, 571 (Iowa 2003). Therefore, the evidence is insufficient to support his conviction of possession. We reverse his conviction and remand for dismissal.

REVERSED AND REMANDED.